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6 and by then sealing and on the same date:

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16 I declare under penalty of perjury that the foregoing is true and that
17 this declaration was executed on this 29th day of January, 1999, at Los
18 Angeles, California.

19
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21 Signature

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF LOS ANGELES

12 ERIKA LANDIN, on behalf of herself and
13 all others similarly situated,

14 Plaintiff,

15 v.

16 LOS ANGELES CELLULAR TELEPHONE
17 COMPANY.

18 Defendant.

CASE NO. BC 143305

Assigned to the Honorable Ernest M. Hiroshige

NOTICE OF MOTION AND MOTION OF
DEFENDANT LOS ANGELES CELLULAR
TELEPHONE COMPANY TO CONTINUE
TRIAL DATE AND ALL ASSOCIATED
PRETRIAL DATES; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF; DECLARATIONS OF STEVEN E.
SLETTEN AND GREGORY P. FARRELL IN
SUPPORT THEREOF

Date: February 16, 1999

Time: 9:00 a.m.

Dept: 54

Trial Date: March 17, 1999

FILED UNDER SEAL

1 TO PLAINTIFF ERIKA LANDIN AND HER ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on February 12, 1999, at 9:00 a.m., or as soon thereafter
3 as this matter may be heard, in Department 54 of the Los Angeles County Superior Court,
4 located at 111 North Hill Street, Los Angeles, California, defendant Los Angeles Cellular
5 Telephone Company ("L.A. Cellular") will and hereby does move the Court for an order
6 continuing the trial date and all associated pre-trial dates in this action for 120 days. This
7 motion is made on the grounds that a soon-to-be-effective change in L.A. Cellular's
8 management and policies will have a significant impact on this case. Continuing the trial will
9 allow the change to be implemented and the parties to determine what, if any, issues will be
10 left for trial in this matter after the change becomes effective.

11 This motion is based upon this Notice of Motion and Motion to Continue the Trial
12 Date and Associated Pre-trial Dates, the accompanying Memorandum of Points and
13 Authorities in support thereof, the accompanying Declarations of Steven E. Sletten and
14 Gregory P. Farrell, the pleadings and other records on file in this action, and such argument as
15 may be received by this Court at the time of the hearing.

16
17 DATED: January 28, 1999

18 GIBSON, DUNN & CRUTCHER LLP
19 STEVEN E. SLETTEN
20 RICHARD D. GLUCK
21 CHRISTINE NAYLOR

22 By: 

Steven E. Sletten

23 Attorneys for Defendant Los Angeles Cellular
24 Telephone Company
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 Plaintiff Erika Landin ("Landin") alleges in this action that defendant Los Angeles
5 Cellular Telephone Company ("L.A. Cellular") does not disclose adequately to subscribers its
6 policy for providing credits for "dropped" calls.¹ L.A. Cellular's "dropped-call" policy, which
7 is described in the tariffs that it historically has filed with the California Public Utilities
8 Commission, provides subscribers credit for part or all of the usage charges applicable to the
9 dropped call. To obtain the credit, an L.A. Cellular subscriber merely has had to call L.A.
10 Cellular and request credit as provided in the tariff. L.A. Cellular has required that procedure
11 because it cannot itself determine whether a call has been "dropped" or whether it was
12 terminated voluntarily by some action of the subscriber. Consequently, only customers who
13 have reported a call as being dropped have been given a credit. It is this policy, and L.A.
14 Cellular's alleged failure to disclose it adequately, that plaintiff challenges in this action.

15 This case is set on the Court's trial calendar for March 17, 1999. As set forth more
16 fully below, L.A. Cellular recently has come under the management of AT&T Wireless
17 Services, Inc. and will be undergoing a number of policy and operational changes, including a
18 change in the way dropped calls are credited so as to bring L.A. Cellular's dropped call credit
19 policy fully in line with other cellular operations of AT&T Wireless Services, Inc. L.A.
20 Cellular believes this change will render moot Landin's claim in this action, and thus L.A.
21 Cellular asks this Court to continue the trial date in this matter for approximately 120 days to
22 allow the change to be implemented and the parties to determine what, if any, issues are left
23 for trial in this matter.

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27 ¹ A dropped call is a call on L.A. Cellular's system that is disconnected while in progress
28 through no fault of the subscriber and placed again by the subscriber within five minutes.

1 II.

2 PROCEDURAL AND FACTUAL SUMMARY

3 Plaintiff filed this action on January 26, 1996 as a putative class action. (Declaration
4 of Steven E. Sletten ("Sletten Decl.") at ¶ 2.) Her complaint alleged the existence of a class
5 of individuals comprised of all L.A. Cellular subscribers who experienced dropped calls for
6 which they received partial or no credit. (*Id.*) Plaintiff's complaint seeks to enjoin L.A.
7 Cellular from "acts of unfair competition" as described in the complaint, and also purports to
8 seek disgorgement and/or restitution on behalf of the class. (*Id.*)

9 L.A. Cellular's first Motion for Summary Judgment was heard on November 12, 1997
10 and the Court issued its Decision on December 19, 1997. (Sletten Decl. at ¶ 3.)
11 Distinguishing the decision in *Waters v. Pacific Telephone Co.*, 12 Cal. 3d 1 (1974), in which
12 the plaintiff sued defendant for monetary damages because of defendant's alleged failure to
13 provide adequate phone service, the Court denied L.A. Cellular's motion for summary
14 judgment because "plaintiff is not seeking damages . . . [but] is challenging whether or not the
15 lack of advertising constitutes an unfair business practice under Bus. & Prof. Code §17200."
16 See December 19, 1997 Ruling on Submitted Matter (denying L.A. Cellular's motion for
17 summary judgment), a copy of which is attached as Exhibit A to the Sletten Declaration, at
18 p. 3. The Court recognized, at that time, that plaintiff's claim essentially is one for injunctive
19 relief, and that because any monetary recovery (in the form of damages, restitution,
20 disgorgement or otherwise) would in essence be a form of prohibited rate regulation,
21 injunctive relief alone would be available on plaintiff's unfair competition claim.

22 Plaintiff's motion for class certification was heard by the Court on July 31, 1998.
23 (Sletten Decl. at ¶ 4.) By that time, the Court of Appeals decision in *Day v. AT&T Corp.*, 63
24 Cal. App. 4th, 325 (1998), had been issued. The Court in *Day* made clear (if there was any
25 doubt) that if granting monetary relief would violate the prohibition against state regulation of
26 cellular service rates, such relief was prohibited, although an action could proceed for
27 injunctive relief to address the alleged unfair practice. 63 Cal. App. 4th at 337-340.

1 On September 30, 1998, the Court denied plaintiff's motion for class certification. (Sletten
2 Decl. at ¶ 4.) In its ruling, a copy of which is attached to the Sletten Declaration as Exhibit B,
3 the Court reiterated that in this case "plaintiff does not seek damages, but rather challenges
4 the failure to advertise the drop call credit policy." Exhibit B at pp. 2-3. Citing the Court of
5 Appeals' decision in *Day*, this Court held that "to seek injunctive relief in this type of action
6 was appropriate: to seek a monetary recovery, whether or not in the form of disgorgement,
7 was not." *Id.* at p. 3 It is therefore well settled in this matter that plaintiff's complaint for
8 violation of Sections 17200 and 17500 is limited solely to a claim for injunctive relief --
9 which would, if plaintiff were successful, presumably be issued in the form of an order
10 requiring L.A. Cellular to change its policy regarding the advertising of procedures for
11 obtaining credits for dropped calls.

12 This Court conducted a Trial Setting Conference on November 13, 1998. (Sletten
13 Decl. at ¶ 5.) At that Conference, this matter was set on the Court's trial calendar for March
14 17, 1999. (*Id.*) Coincidentally, November 13, 1998 also marks the date of a significant
15 change in L.A. Cellular's corporate and management structure. Before November 13, 1998,
16 L.A. Cellular operated as a California general partnership, the general partners of which were
17 two California corporations within the AT&T and BellSouth corporate organizations.
18 (Declaration of Gregory P. Farrell ("Farrell Decl.") at ¶ 3.) As of November 13, 1998, L.A.
19 Cellular reorganized and became AB Cellular Holding LLC, a Delaware limited liability
20 company doing business as L.A. Cellular. (*Id.*) As part of the reorganization, L.A. Cellular is
21 now managed by AT&T Wireless Services, Inc. pursuant to the terms of a management
22 agreement. (*Id.*) Under the new management structure, L.A. Cellular will be making a
23 number of changes in its policies and procedures to bring its operations in conformity with the
24 many other AT&T Wireless Services, Inc. cellular businesses in California and elsewhere.
25 (*Id.*) One of the changes that will be implemented in the next several months concerns L.A.
26 Cellular's policy for granting credits for dropped calls. (*Id.*)

27 In adopting AT&T Wireless Services, Inc.'s dropped-call credit policy, L.A. Cellular
28 will begin offering its subscribers "automatic" credits for dropped calls. (Farrell Decl. at ¶ 4.)

Plaintiff herself, purporting to cite AT&T Wireless Services, Inc.'s "rates and coverage" brochure from Dallas, Texas, describes AT&T Wireless Services, Inc.'s policy in her complaint at paragraph 22:

Automatic call credit guaranties. If you place a call and it is dropped, you will automatically be credited for one minute of day air time when you call the same number back within one minute. Just re-dial and keep talking.

* * * *

An automatic dropped call credit will be provided for airtime charges above the minutes included in your package plan, when a call is dropped by our switch on an outbound call, within the home coverage area, and the number is re-dialed and connected within 60 seconds.

Complaint. ¶22. L.A. Cellular also will soon begin to offer automatic credits for dropped calls -- a one minute credit whenever a call is terminated and the same number is dialed again (as evidenced by the subscriber's billing statement) within a stated time period of the original call being terminated.² (Farrell Decl. at ¶ 4.) Plaintiff alleges in her complaint that "by refusing to issue an automatic credit to its customers' for dropped calls, [L.A. Cellular] is engaging in unfair conduct" This is, of course, the crux of plaintiff's complaint in this matter.

Because plaintiff's only remaining claim is for an injunction requiring L.A. Cellular to disclose that customers will receive credits for dropped calls if they report them -- which no longer will be the case under the new policy -- the change in L.A. Cellular's policy will render moot plaintiff's sole remaining claim in this action. The question that this motion presents, then, is whether the parties and the Court should incur the enormous expense of preparing for

2 It should be noted that this policy does not in any way, from a technical standpoint, identify "dropped calls," because it provides an automatic credit for any call when a call is terminated and the subscriber places another call to the same number within the specified time period. The policy assumes such a call was dropped and, obviously, is over-inclusive since it will grant credits to a subscriber whose call is terminated voluntarily and then placed again within the time limit specified in the policy. (*Id.*) As L.A. Cellular explained in its Opposition to plaintiff's motion for class certification, its system has no way technically to identify dropped calls -- a call that is interrupted involuntarily due to atmospheric conditions or gaps in coverage.

1 and proceeding to trial in an action where the sole relief sought by the plaintiff will shortly
2 become moot.

3 III.

4 THE CHANGE TO L.A. CELLULAR'S DROPPED CALL POLICY 5 WILL MOOT PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF IN 6 THIS ACTION

7 Plaintiff can obtain only injunctive relief in this action under California's Unfair
8 Competition Act ("UCA"), Business & Professions Code section 17200. The UCA authorizes
9 courts to enjoin acts of "unfair competition" (Bus. & Prof. Code § 17203), which the UCA
10 defines as any unlawful, unfair or fraudulent business practice. Bus. & Prof. Code § 17200.
11 Courts retain under the UCA their historical equitable discretion to rely on generally
12 applicable equitable principles in determining whether injunctive relief is warranted. *See,*
13 *e.g., ABC International Traders, Inc. v. Matsushita Electric Corp.*, 14 Cal. 4th 1247, 1270
14 (1997) (noting that in deciding whether to issue an injunction under section 17203, courts
15 may find that issuing such an injunction is moot as a practical matter); *Cf. Prudential Home*
16 *Mortgage Co. v. Superior Court*, 66 Cal. App. 4th 1236, 1250 (199_) (concluding that
17 adequacy of other remedies available to plaintiffs precluded equitable relief under the UCA).

18 Many courts have relied on equitable principles to refuse to enjoin an allegedly unfair
19 practice that was no longer ongoing. *See, e.g., Mid-Peninsula Citizens for Fair Housing v.*
20 *Westwood Investors*, 221 Cal. App. 3d 1377, 1392 (1990) (denying plaintiff's requested
21 injunctive relief because the challenged policy had been withdrawn and there was no
22 indication that it would be resumed); *California Service Station and Automotive Repair*
23 *Association v. Union Oil Co. of California*, 232 Cal. App. 3d 44, 47 (1991) (noting that
24 "injunctive relief will be denied if at the time of the order or judgment there is no reasonable
25 probability that the past acts complained of will recur"); *People v. National Association of*
26 *Realtors*, 120 Cal. App. 3d 459, 476 (1981) ("[W]here the injunction is sought solely to
27 prevent recurrence of prescribed conduct which has, in good faith been discontinued. there is
28

1 no equitable reason for an injunction"): *Barquis v. Merchants' Collection Association*, 7
2 Cal. 3d 94, 108 (1972).

3 Here, L.A. Cellular's new policy, which automatically will provide credits for dropped
4 calls, necessarily will render moot plaintiff's attempt to require L.A. Cellular to offer such
5 automatic credits or inform consumers that they will receive credit for dropped calls if they
6 request such a credit. And because the injunctive relief claim is the only one that remains in
7 this action, there likely will remain no issues to try after the change in L.A. Cellular's
8 dropped-call policy. Consequently, L.A. Cellular requests that the Court continue the
9 scheduled trial date 120 days to allow the change to become effective so the parties can
10 evaluate the effect of the change on this action and, if necessary, present to the Court in the
11 appropriate manner arguments concerning that effect.

12 IV.

13 THE STANDARD FOR A TRIAL CONTINUANCE

14 In order to secure a continuance of a trial date, the moving party must show "good
15 cause" justifying it. *See* Cal. Rule of Court 375. Rule 375 specifically references Section 9 of
16 the Appendix to the Rules of Court - - Judicial Administration Standards to demonstrate the
17 rationale for a continuance:

18 In general, the necessity for the continuance should have resulted from an
19 emergency occurring after the trial-setting conference that could not have been
20 anticipated or avoided with reasonable diligence and cannot now be properly
21 provided for other than by granting of a continuance. In ruling on a motion for
22 a continuance, the court should consider all matters relevant to a proper
23 determination of the motion, including the court's file in the case and any
24 supporting declarations concerning the motion; the diligence of counsel,
25 particularly in bringing the emergency to the court's attention and to the
26 attention of opposing counsel at the first available opportunity and in attempting
27 to otherwise meet the emergency; . . . [and] whether the interests of justice are
28 best served by a continuance

24 The following matters should, under normal circumstances, be considered good
25 cause for granting the continuance of a trial date:

26

27 (5) Significant change in the status of case:

28 Appendix to California Rules of Court - - Judicial Administration Standards, Section 9.

1 The upcoming change in L.A. Cellular's dropped-call credit policy certainly constitutes
2 a "significant change" in the status of the case -- had the new policy been in place before
3 plaintiff filed her complaint, it would not of course have ever been brought. It also was not a
4 development that could reasonably have been anticipated at the time of the Trial Setting
5 Conference in November. The decision to make the change was made only recently, and will
6 be implemented in the next several months. (Sletten Decl. at ¶ 11). As soon as counsel
7 became aware of the planned change, he contacted counsel for plaintiff to discuss how the
8 change in policy will impact plaintiff's claims in the case. (*Id.*) Finally, the interests of
9 justice will be best served by the brief continuance requested in this motion. There is no good
10 reason to require the parties to complete discovery and go to the time and expense of
11 preparing for a March 17, 1999 trial if the change in policy that will take effect in the next
12 several months has the effect of rendering plaintiff's claims moot. This case only recently has
13 been placed on the Court's trial calendar, and no previous continuances have been requested
14 by any of the parties or granted by the Court. (Sletten Decl. at ¶ 12.)

15 V

16 CONCLUSION

17 For the reasons set forth above, L.A. Cellular requests that the Court continue the trial
18 date in this matter for 120 days to enable the parties and the Court to evaluate the effect of the
19 upcoming change in L.A. Cellular's dropped-call credit policy on plaintiff's claims in this
20 matter and whether there are any issues left for trial following the change in policy.

21 DATED: January 28, 1999

22 GIBSON, DUNN & CRUTCHER LLP
23 STEVEN E. SLETTEN
24 RICHARD D. GLUCK
25 CHRISTINE NAYLOR

26 By: 

27 Steven E. Sletten

28 Attorneys for Defendant Los Angeles Cellular
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